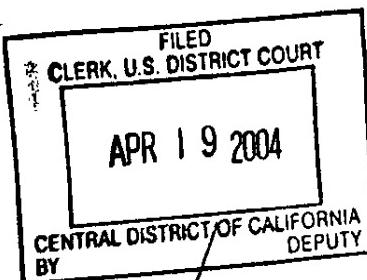


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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

12 UNITED STATES OF AMERICA, ) Case No. CR 03-41-WJR  
13 Plaintiff, )  
14 v. )  
15 KELLI DAVIS, )  
16 Defendant. )

~~PROPOSED~~ FINDINGS OF FACT  
AND CONCLUSIONS OF LAW

ENTERED ON IOMS

APR 20 2004

17  
18 The Court Finds As Follows:

19 On August 25, 2003, this Court held a hearing on defendant's  
20 Motion and Supplemental Memorandum In Support of Motion for  
21 Judgment of Acquittal or Alternatively for a New Trial.

22 Defendant appeared with her counsel of record, Mark Geragos.  
23 Assistant United States Attorneys Lawrence Middleton and  
24 Christine Adams appeared for the government.

25 The Court, after carefully considering the pleadings,  
26 declarations and documents filed by the parties, as well as the  
27 argument presented at the hearing, orally denied the motion at  
28 the hearing. This Order will supplement the Court's oral ruling

108

1 denying the motion. In connection with this Order, the Court  
2 makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

4 A. There Was Sufficient Evidence to Sustain Defendant's  
5 Conviction for Wire Fraud

6       1. The Court finds that the evidence presented at trial  
7 was sufficient to establish (1) that defendant acted with the  
8 knowledge that wire transmissions would follow in the ordinary  
9 course of business; and (2) that the wire transmissions could  
10 reasonably be foreseen. The indictment charged wire transfers of  
11 funds from the lenders' banks to HUD's bank account at Mellon  
12 Bank, in Pennsylvania. These transfers occurred to effect  
13 payment of the mortgage insurance premium in connection with each  
14 loan. (3/19/03 RT 182-83). Such wire transfers were routine in  
15 that HUD would not insure a loan unless the lender wire  
16 transferred the mortgage insurance premium to HUD's Mellon Bank  
17 account in Pennsylvania. (3/19/03 RT 178, 182-83). The parties  
18 stipulated that the charged wire transfers occurred; thus, the  
19 only issue was whether defendant had the requisite knowledge.  
20 (3/27/03 RT 881 (Exh. 113 received in evidence)).

21       2. The evidence at trial established the following facts,  
22 which were sufficient to establish that defendant was aware of  
23 the wire transmissions charged in the indictment or that the wire  
24 transmissions were reasonably foreseeable:

25                   a.     that defendant worked as a loan agent at Great  
26 Western Bank as early as 1990 (3/19/03 RT 222; 3/25/03 RT 426),  
27 and that defendant worked as a loan officer at RE Mortgage from  
28 January 1995 through September 1999 (3/19/03 RT 223, 226-27;

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1 4/1/03 RT 6);

2 b. that defendant was knowledgeable about Federal  
3 Housing Administration (FHA) loans as early as 1996 (when she  
4 worked as a loan officer in Anaheim) (3/19/03 RT 223, 226-27,  
5 232-33; 3/25/03 RT 427-28);

6 c. that defendant handled at least eighty FHA-insured  
7 loans during the 1995 through 1999 time frame (3/27/03 RT 838);

8 d. that defendant had years of experience as a loan  
9 officer in the real estate industry (4/1/03 RT 100);

10 e. that defendant had worked for numerous companies  
11 as a loan officer (4/1/03 RT 5-7, 125);

12 f. that defendant did business with numerous large  
13 lenders and had for many years (4/1/03 RT 34);

14 g. that defendant funded thirty to forty, and  
15 processed seventy to eighty, loans per month from 1997 through  
16 1999 (4/1/03 RT 36);

17 h. that defendant handled conventional loans and  
18 loans insured by the FHA (4/1/03 RT 37,100-07); and

19 i. that defendant spent most of her time outside the  
20 office meeting with real estate agents, lenders and borrowers  
21 (4/1/03 RT 43).

22 B. The Interests of Justice Do Not Warrant Granting a New Trial

23 3. The Court finds that the interests of justice do not  
24 warrant granting defendant a new trial on any basis, including  
25 the Court's decision at trial to admit (1) the Limited Denial of  
26 Participation letters from the Department of Housing and Urban  
27 Development (HUD); (2) testimony of FBI Special Agent Jeffrey  
28 Fellman regarding loan transactions during the time period of the

1 fraud scheme; and (3) defendant's 1996 Internal Revenue Service  
 2 Form 1099.

3       4. The interests of justice do not here require the  
 4 granting of a new trial.

5 C. The Limited Denial of Participation Letters from HUD Were  
 6 Properly Admitted

7       5. Government's Exhibit 109, a letter dated February 25,  
 8 2000, notified defendant of HUD's decision to preclude her from  
 9 participation in HUD's Single Family Insurance Programs within  
 10 the jurisdiction of HUD's Santa Ana Homeownership Center. The  
 11 February 25, 2000 letter explained:

12           The cause of this LDP [Limited Denial of  
 13 Participation] is that you, in your capacity  
 14 as a Loan Officer employed by R. E. Mortgage  
 15 Group, Inc., participated in the submission  
 documents and statements concerning the  
 borrower for the following properties:

FHA Case No.	Borrower	Property Address
048-0531139	Dyer	6988-6988 ½ Fairfax Dr., San Bernardino, CA 92404
048-531122	Dyer	7020, 7022, 7024 Dwight Way, San Bernardino, CA 92404

20           Specifically, you submitted loan  
 21 applications for both properties in which the  
 22 same borrower certified each property to be  
 23 her primary residence. The false documents  
 were used to influence the insurance of these  
 loans by HUD.

24 The February 25, 2000 letter informed defendant that within  
 25 thirty days of receipt of the letter, she could make a written  
 26 request for a conference regarding the LDP or she could "contest  
 27 the LDP under the provisions of 24 CFR 24.713."

28       6. Government's Exhibit 110, a letter dated May 1, 2000,

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1 referenced HUD's February 25, 2000 letter. In the May 1, 2000  
2 letter, HUD notified defendant that the limited denial of  
3 participation would remain in effect for one year because  
4 defendant "did not request a conference or contest the LDP under  
5 the provisions of 24 CFR 24.713."

6       7. Counts one and two of the indictment charged defendant  
7 with wire fraud for the property transactions listed in the  
8 February 25, 2000 letter - Fairfax Drive and Dwight Way. In the  
9 Execution of the Scheme to Defraud Section, the indictment  
10 alleged defendant knowingly submitted false statements in the  
11 loan files. In addition to submitting false employment documents  
12 and fraudulent down payments in the Fairfax Drive and Dwight Way  
13 loan files, the indictment specifically charged defendant with  
14 the following:

15           3. On January 22, 1998, the loan funded  
16 for the purchase of the property located at  
17 6988, 6988 ½ Fairfax Drive, San Bernardino,  
18 California. On January 26, 1998, the loan  
19 funded for the purchase of the property  
20 located at 7020, 7022, 7024 Dwight Way, San  
Bernardino, California. Defendant KELLI  
DAVIS submitted the loan applications for  
both properties and certified that Cheryl  
Dyer, intended each property to be her  
primary residence.

21 The indictment charged defendant with the exact activity at issue  
22 in the LDP letters - defendant submitted two separate loan files  
23 to HUD in the name of Cheryl Dyer and certified that Dyer  
24 intended each property to be her primary residence.

25       8. Defendant received the first letter informing her of  
26 the LDP and giving her the right to contest the LDP or request a  
27 conference. Defendant did not contest the LDP or request a  
28 conference.

1       9. In an abundance of caution and at the defendant's  
2 request, the Court gave the jury the following limiting  
3 instruction to prevent any potential confusion:

4             You have been presented with evidence that  
5 defendant may have received a letter from the  
6 United States Department of Housing and Urban  
7 Development stating its intent to suspend  
8 defendant from participation in HUD loan  
9 programs for submitting two loans at the same  
10 time, and that defendant failed to respond to  
11 that letter. You may consider that testimony  
12 and evidence only to the extent that it tends  
13 to prove the existence of an element of a  
14 charged crime. You may not find defendant  
15 guilty of the charged crime merely because of  
16 any administrative action that may or may not  
17 have been taken by HUD.

18 D. Testimony Regarding the Scope of the Fraud Scheme Was  
19       Properly Admitted

20       10. The indictment charged defendant with participating in  
21 a fraud scheme "[b]eginning on a date unknown but no later than  
22 September 1995, and continuing to a date unknown but at least  
23 until December 1999."

24       11. On February 24, 2003, Judge Baird granted a motion to  
25 strike from the indictment language concerning the dollar amount  
26 of fraudulent loans submitted during the fraud scheme. In making  
27 her ruling, Judge Baird asked if the government had provided the  
28 underlying discovery relating to the fraudulent loans. At the  
time of the hearing, the government had not produced the  
underlying discovery.

12. On March 3, 2003, the government produced the loss  
calculations, which identified 80 property transactions during  
the fraud scheme, to defendant. (McCaffrey Dec., Exhs. A and B.)  
The March 3, 2003 discovery letter stated that the loss

1 calculations and other items produced were "disclosed under the  
2 same terms and conditions set forth in the government's original  
3 discovery letter." Id. In the government's original discovery  
4 letter dated January 28, 2003, the government informed defendant  
5 that it "will make available for your inspection any item of  
6 evidence referred to in the enclosed reports/documents."  
7 (McCaffrey Dec., Exh. C.) Therefore, as of March 3, 2003, the  
8 government not only identified the 80 property transactions at  
9 issue, but made the underlying property files available to the  
10 defense for review.

11       13. At trial, Special Agent Jeffrey Fellman of the Federal  
12 Bureau of Investigation testified that he identified eighty loans  
13 in claims status in which defendant was the loan officer for the  
14 time period September 1995 through December 1999. (3/27/03 RT  
15 836-838). He also testified that the loss suffered by HUD as a  
16 result of those eighty loans was \$4.7 million. Id.

17       14. The defendant objected to the introduction of this  
18 testimony. The Court heard arguments from both parties. The  
19 Court found that the information was relevant and admissible.  
20 The Court's finding was not inconsistent with Judge Baird's prior  
21 ruling. Moreover, the Court is not bound by the prior ruling and  
22 had the discretion to revisit this issue. Luce v. U.S., 469 U.S.  
23 38, 41-42 (1984) (finding "the district judge is free, in the  
24 exercise of sound judicial discretion, to alter a previous in  
25 limine ruling.")

26 E. Defendant's 1996 Form 1099 Was Properly Admitted

27       15. Government's Exhibit 101 is a 1996 Form 1099 for  
28 defendant from her employer R.E. Mortgage Group, Inc.

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1 Government's Exhibit 101 shows that defendant earned \$526,541.94  
2 in 1996 - during the relevant time period of the fraud scheme.

3       16. At trial, defendant testified that the \$526,541.94  
4 represented commissions for the year. She stated that she worked  
5 twelve to fourteen hours on Monday through Friday and worked  
6 sometimes on Saturday and Sunday. She also testified that the  
7 \$526,541.94 did not reflect expenses associated with her job.

8 F. The Government Did Not Commit Prosecutorial Misconduct in  
9       Its Closing Argument

10       17. The Court finds that the government did not commit  
11 misconduct during its closing argument. The government argued  
12 that evidence of other wire transmissions that occurred in  
13 connection with the same loan transactions charged in the  
14 indictment could be used to determine whether defendant knew the  
15 charged wire transmissions would follow in the ordinary course of  
16 business or whether those wire transmissions were reasonably  
17 foreseeable. This argument was entirely appropriate.

18       18. The Court finds that the government did not imply in  
19 its closing argument, as defendant claims, that the wire transfer  
20 fees reflected in the settlement statements (and identified as  
21 government's exhibits 5 and 23 at trial) were the wire transfers  
22 charged in the indictment. Rather, the government argued that  
23 evidence of the wire transfers reflected in exhibits 5, 11, and  
24 23 could be considered in determining whether the wire transfers  
25 charged in the indictment were reasonably foreseeable to  
26 defendant. (4/3/03 RT 83-94.) Exhibits 5, 11, and 23 were  
27 settlement statements in real estate transactions that were the  
28 subjects of counts one, two, and three, respectively, in the

1 indictment. It was reasonable for the jury to infer, and for the  
2 government to argue, that evidence of other wire transfers in the  
3 same transactions made it more likely that the charged wire  
4 transfers were reasonably foreseeable to defendant. It was also  
5 reasonable for the jury to infer from this evidence that  
6 defendant knew the charged wire transactions would occur in the  
7 ordinary course of business.

8       19. The government also argued that defendant's experience  
9 as a loan officer in general, and with mortgage insurance  
10 premiums in particular, made it more likely that the charged wire  
11 transfers were reasonably foreseeable to her. (4/3/03 RT 84-85).  
12 This was also entirely appropriate.

13       20. Contrary to defendant's claims, the government never  
14 resorted to misconduct and never misrepresented the evidence.

15       21. The government based its argument on the Court's  
16 instructions to the jury and on testimony and exhibits that were  
17 admitted in evidence at trial. The government argued only the  
18 evidence and reasonable inferences based on the evidence. Thus,  
19 there was nothing improper about the government's closing  
20 argument.

21       22. Any Conclusions of Law that also constitute Findings of  
22 Fact are hereby incorporated into these Findings of Fact.

23    CONCLUSIONS OF LAW

24 A. There Was Sufficient Evidence to Sustain Defendant's  
25 Conviction for Wire Fraud

26       1. A judgment of acquittal is warranted pursuant to Rule  
27 29 of the Federal Rules of Criminal Procedure if the evidence is  
28 insufficient to sustain a conviction. Fed. R. Crim. P. 29(a).

1 The Ninth Circuit has held that "[a] motion for judgment of  
2 acquittal should be granted only if, viewing the evidence in the  
3 light most favorable to the government, no rational trier of fact  
4 could find beyond a reasonable doubt that the defendant is the  
5 person who committed the charged crime." United States v.  
6 Alexander, 48 F.3d 1477, 1490 (9th Cir. 1995) (affirming denial  
7 of motion for judgment of acquittal because evidence was  
8 sufficient to prove defendant robbed bank); see also United  
9 States v. Tisor, 96 F.3d 370, 379 (9th Cir. 1996) (affirming  
10 denial of motion for judgment of acquittal because evidence was  
11 sufficient to prove defendant distributed methamphetamine and  
12 conspired to do so). "The government is entitled to all  
13 reasonable inferences that can be drawn from the evidence."  
14 United States v. Lucas, 963 F.2d 243, 247 (9th Cir. 1992).

15 2. The crime of wire fraud may be established (1) where  
16 one acts with the knowledge that the wire transmissions will  
17 follow in the ordinary course of business, or (2) where the wire  
18 transmissions can reasonably be foreseen. United States v.  
19 Stapleton, 293 F.3d 1111, 116-17 (9th Cir. 2002) (quoting United  
20 States v. Lothian, 976 F.2d 1257, 1262-63 (9th Cir. 1992)).

21 3. The evidence was sufficient for the jury to convict  
22 defendant as charged in the indictment. Accordingly, defendant's  
23 motion for judgment of acquittal is denied.

24 B. The Interests of Justice Do Not Warrant Granting Defendant a  
25 New Trial

26 4. Federal Rule of Criminal Procedure 33 provides: "On a  
27 defendant's motion, the court may grant a new trial to that

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1 defendant if the interests of justice so require."<sup>1</sup> A motion for  
 2 a new trial "should be granted 'only in exceptional cases in  
 3 which the evidence preponderates heavily against the verdict.'" "  
 4 U.S. v. Pimentel, 654 F.2d 538, 545 (9th Cir. 1981) (citation  
 5 omitted).

6       5. The interests of justice do not here require the  
 7 granting of a new trial.

8 C. The Limited Denial of Participation Letters from HUD Were  
 9 Properly Admitted

10       6. Government's Exhibits 109 and 110, the LDP letters,  
 11 were properly admitted. The LDP letters were relevant and  
 12 probative of a fact of consequence in the case as charged in the  
 13 indictment - the submission of two separate loan files in the  
 14 name of Cheryl Dyer and the fraudulent certification that Dyer  
 15 intended each property to be her primary residence.

16       7. Given the effect a LDP would have on defendant's  
 17 business, her failure to respond to the letters was an arguably  
 18 adoptive admission that she had, in fact, knowingly submitted the  
 19 two loans with false information. (3/26/03 RT, 725-727); United  
 20 States v. Schaff, 948 F.2d 501, 505 (9th Cir. 1991) (finding an  
 21 adoptive admission when "under the circumstances, an innocent  
 22 defendant normally would respond to the statement"); United  
 23 States v. McKinney, 707 F.2d 381 (9th Cir. 1983) (applying the  
 24 same test).

25       8. The admission of the LDP documents did not confuse or

---

26  
 27       <sup>1</sup> Because defendant has not moved for a new trial based on  
 28 newly discovered evidence, the following discussion focuses on  
 the "any other grounds" basis for a Rule 33 motion.

1 mislead the jury.

2 D. Testimony Regarding the Scope of the Fraud Scheme Was  
3 Properly Admitted

4 9. The indictment charged defendant with six specific  
5 counts of wire fraud and with participating in a fraud scheme  
6 "[b]eginning on a date unknown but no later than September 1995,  
7 and continuing to a date unknown but at least until December  
8 1999." Special Agent Felmann's testimony about the eighty  
9 property transactions during the fraud scheme that went into  
10 claims status was not evidence admitted pursuant to Federal Rule  
11 of Evidence 404(b). The testimony related to the scope of the  
12 fraud scheme was "inextricably intertwined" with the crimes  
13 charged.

14 10. "Evidence should not be treated as 'other crimes'  
15 evidence when the evidence concerning the other act and evidence  
16 concerning the crime charged are inextricably intertwined. . . .  
17 The policies are simply inapplicable when some offenses committed  
18 in a single criminal episode become 'other acts' because the  
19 defendant is indicted for less than all of his actions." United  
20 States v. Soliman, 813 F.2d 277, 278 (9th Cir. 1987) (internal  
21 citations and punctuation omitted).

22 11. "Inextricably intertwined" evidence is not limited to  
23 situations in which it is used to "flesh out the circumstances  
24 surrounding the crime [charged], thereby allowing the jury to  
25 make sense of the testimony in its proper context." United  
26 States v. Ripinsky, 109 F.3d 1436, 1442 (9th Cir. 1997)  
27 (overturned on other grounds) (internal citations omitted).  
28 Rather, the evidence is inextricably intertwined with the

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1 evidence of the crimes charged when such evidence is "direct  
2 evidence of the ongoing conspiracy charged in the indictment."

3 Id.

4 12. Evidence is inextricably intertwined with the charged  
5 conduct when it establishes an "ongoing scheme to defraud."  
6 United States v. Sayakhom, 186 F.3d 928, 938 (9th Cir. 1999).

7 13. In this case, defendant was "indicted for less than all  
8 of [her] actions." Soliman, 813 F.2d at 278. Though the  
9 indictment alleged a fraud scheme from September 1995 through  
10 December 1999 - over four years, defendant was specifically  
11 charged only with six counts of wire fraud arising from six  
12 specific loans between January 1998 and October 1998. As Special  
13 Agent Fellman's testimony established, the scheme actually  
14 encompassed about eighty property transactions that took place  
15 during the alleged time frame of the scheme. Though wires  
16 arising from those 80 loans were not specifically charged, the  
17 loans themselves remained direct evidence of the underlying  
18 scheme, the same scheme that underlay the six specific charges.

19 14. Special Agent Felmann's testimony also gave context to  
20 the government's investigation and prosecution of defendant.  
21 Special Agent Felmann explained that the government investigated  
22 defendant after being alerted to fraudulent activities at R.E.  
23 Mortgage Group, Inc., defendant's employer during the relevant  
24 time period. In investigating R.E. Mortgage Group, Inc., the  
25 government discovered that defendant had the largest number of  
26 loans in default of all R.E. Mortgage employees.

27 15. In addition, the scope of the fraud scheme is relevant  
28 to defendant's silence when confronted with a limited denial of

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5

1 participation from HUD programs. Given the large number of FHA  
2 loans defendant processed, the denial of participation would have  
3 adversely affected her business. Therefore, her non-response to  
4 the LDP letters is viewed as an adoptive admission as discussed  
5 above.

6       16. The testimony regarding the scope of the fraud scheme  
7 was relevant to the case, and not misleading or prejudicial.  
8 Defendant's due process rights were not violated.

9 E. Defendant's 1996 Form 1099 Was Properly Admitted

10       17. Government's Exhibit 101 was relevant to show profits  
11 of the scheme and defendant's intent to defraud.

12       18. Defendant's objection to the admissibility of  
13 Government's Exhibit 101 went to the weight of the evidence, not  
14 its admissibility. See United States v. Tank, 200 F.3d 627, 630-  
15 31 (9th Cir. 2000) (flaws in the evidence go to the weight of the  
16 evidence, not its admissibility).

17 F. The Government Did Not Commit Prosecutorial Misconduct in  
18 Its Closing Argument

19       19. It is entirely appropriate for the government to base  
20 its argument on the evidence and all reasonable inferences from  
21 the evidence. United States v. Henderson, 241 F.3d 638, 652 (9th  
22 Cir. 2001) (citations omitted).

23       20. When prosecutorial misconduct is alleged, "the issue is  
24 whether, considered in the context of the entire trial, that  
25 conduct appears likely to have affected the jury's discharge of  
26 its duty to judge the evidence fairly." Henderson, 241 F.3d at  
27 652 (quoting United States v. Frederick, 78 F.3d 1370, 1379 (9th  
28 Cir. 1996)). The court should consider the government's entire

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1 closing argument in context when analyzing a defendant's claim of  
2 prosecutorial misconduct based on portions of the government's  
3 closing argument. See id.; United States v. Santiago, 46 F.3d  
4 885, 892-93 (9th Cir. 1995) (finding that government's statement  
5 in rebuttal portion of closing argument does not constitute  
6 reversible error "when considered in context"). The government's  
7 comments, considered in context, demonstrate at worst that the  
8 language used was imprecise. They are in no way sufficient to  
9 establish prosecutorial misconduct.

10       21. The government did not commit misconduct in its closing  
11 argument.

12       Based on the foregoing, the defendant's Motion and  
13 Supplemental Memorandum In Support of Motion for Judgment of  
14 Acquittal or Alternatively for a New Trial is DENIED.

15  
16

17 IT IS SO FOUND AND ORDERED.

18

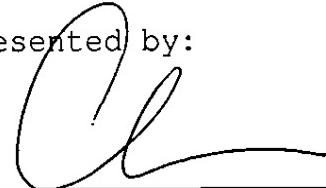
19 DATED: 4-19-04



HONORABLE WILLIAM J. REA  
UNITED STATES DISTRICT JUDGE

21

22 Presented by:



23  
24 Christine M. Adams  
25 Assistant United States Attorney

26

27

28

1                           **CERTIFICATE OF SERVICE**

2       I, **Evelyn Masaitis**, declare:

3           That I am a citizen of the United States and resident or  
4 employed in Los Angeles County, California; that my business  
5 address is the Office of United States Attorney, United States  
6 Courthouse, 312 North Spring Street, Los Angeles, California  
7 90012; that I am over the age of eighteen years, and am not a  
8 party to the above-entitled action;

9           That I am employed by the United States Attorney for the  
10 Central District of California, who is a member of the Bar of the  
11 United States District Court for the Central District of  
12 California, at whose direction I served a copy of:

13                           **[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

14           service was:

15       [ ] Placed in a closed  
16 envelope, for collection and  
interoffice delivery addressed  
as follows:

[X] Placed in a sealed  
envelope for collection and  
mailing via United States  
Mail, addressed as follows:

17       [ ] By hand delivery addressed  
18 as follows:

[X] By facsimile addressed as  
follows:

19       [ ] By messenger addressed as  
20 follows:

[ ] by Federal Express  
addressed as follows:

21       **Mark M. Kassabian**  
22       **Geragos & Geragos**  
23       **350 S. Grand Avenue**  
39<sup>th</sup> Floor  
24       **Los Angeles, CA 90071-3480**  
Facsimile: (213) 625-1600

25           This Certificate is executed on **March 16, 2004** at Los  
26 Angeles, California. I certify under penalty of perjury that the  
27 foregoing is true and correct.

28                           Evelyn Masaitis  
Evelyn Masaitis